No. 568

Supreme Court, U.S.
FILED
OCT 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 568

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION and FEDERAL POWER COMMISSION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 22, 1957

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13199

MISSISSIPPI RIVER FUEL CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

On Petition for Review of Order of the Federal Power Commission

Decided July 8, 1957

Mr. William A. Dougherty, with whom *Mr. Henry F. Lippitt, II*, was on the brief, petitioner.

Mr. Louis L. DaPra, Attorney, Federal Power Commission, of the bar of the Supreme Court of Indiana, *pro hac vice*, by special leave of Court, with whom *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Mr. Howard E. Wahrenbrock*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas Fletcher, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Mr. C. Huffman Lewis* was on the brief, for intervenor. *Mr. Morton E. Yohalem* also entered an appearance for intervenor.

Before PRETTYMAN, BAZELON and BURGER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a petition to review an order of the Federal Power Commission. Two companies

are involved. United Gas Pipe Line Company, which we shall call "United", is a natural gas company operating a large natural gas transmission system. It is the vendor of the gas with which we are concerned. Mississippi River Fuel Corporation, which we shall call "Mississippi", is also a natural gas company operating a transmission system. It buys from United.

Mississippi and United had two contracts. One was made in 1929. It originally provided for the sale and purchase of gas from certain designated fields at certain designated prices and contained certain other provisions which we will discuss later. It was amended from time to time until 1949. The other contract was made in 1951. It was premised upon the construction of new pipe-line facilities by United. It obligated Mississippi to a specified demand per day and established a price different from that in the old contract.

The proceeding before the Commission began in 1948 as an investigation into the rates and charges of United. The Commission ordered United to file a restatement of its rates in a "conversion tariff", and United did so. Hearings were held from time to time, and in 1954 all parties except Misssissippi and another agreed to a compromise settlement. Further hearings were ordered and held concerning the issues raised by Mississippi. They culminated in November, 1955, in the order here under review.

Generally speaking, the features of the order which are attacked by Mississippi are: (1) The Commission allowed as a cost of service the full prices paid for gas by United to an affiliate wholly owned by a common parent;[1] (2) the

[1] The petitioner's application for rehearing specifically included this point. We do not read Federal Power Comm'n v. Colorado Interstate Gas Co., 348 U. S. 492, 99 L. Ed. 583, 75 S. Ct. 467 (1955), as requiring that the application for rehearing cite every case relied upon before the Court of Appeals.

Commission approved a rolled-in form of rate for sales to Mississippi, ignoring the prior contract commitments and the widely different costs incurred in supplying those commitments; (3) the Commission abrogated a 1945 purchase agreement (a supplement to the 1929 contract) between United and Mississippi by omitting a provision requiring United to supply such quantities of gas as Mississippi might nominate by 1961 and by inserting a minimum take-or-pay provision; and (4) the Commission directed United to file a rate schedule containing rates higher than the 1929 contract rate then on file.[2] We shall discuss these points in order.

I

United has an affiliate, the Union Producing Company, wholly owned by their common parent. United bought in 1953, the test year, approximately 20 per cent of its gas from Union. The price was self-determined by the related companies without regulatory restriction. No cost data was submitted. In fixing the rates to be paid United by Mississippi, the Commission included the price paid Union by United as part of the cost of service.

Mississippi says the Commission erred, in that the prices paid Union were dependent only "on the subjective feeling of United's Management" and no measurement was made in this proceeding by any "objective standards". It cites a number of authorities, particularly *Western Distributing Co. v. Public Service Comm'n.*[3]

The Commission says that, while it is empowered to inquire into United's contract prices, it was not required to do so and its action here was a reasonable exercise of adminis-

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[2]An increase over the original 1929 rate became effective, subject to refund, on January 3, 1953, pursuant to an interim tariff filing by United.

[3]285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283 (1932).

trative discretion. To have done otherwise, it says, would have meant a full-blown rate case against Union, vastly enlarging an already large and long-pending proceeding.

The gas sold United by Union came from some 592 wholly-owned wells and 365 partially-owned wells in numerous fields. It was bought under more than 300 contracts. What the examiner did was to compare the prices United paid to Union with the prices United paid to non-affiliated producers. He concluded that the weighted average price paid by United to its non-affiliated producers is substantially more than the weighted price paid Union by United. Thus, he said, the evidence showed that United-Union prices, judged by these objective standards, were not above a level conceded by Mississippi to be fair, just and reasonable for others. His conclusions were adopted by the Commission and held to be a sufficient basis for including the prices paid Union as part of United's cost of service.

The Commission stresses the inadvisability of a full-blown inquiry into Union's rates as a part of this proceeding. Ordinarily regulatory agencies do not inquire into the price structures of suppliers of goods to regulated utilities; they have a measure of duty to inquire into the reasonable fairness of the prices paid by the utility and to be allowed as costs in the determination of rates. But here the supplier (Union) and the utility (United) are corporate affiliates.

In this situation there are several important factors not ordinarily present. The United-Union prices were not arm's-length transactions. From time to time these prices between the two affiliates were increased. At least part of the increase authorized by the Commission in United's prices to Mississippi arose from these increases in United's payments to Union. If the United-Union increases were bona fide increases in costs incurred by Union in acquiring gas, that would be one thing; but, if they were merely a device for siphoning potential profits from one affiliate to

another, for transferring amounts from an advantage to customers to an advantage for stockholders, that is another thing. If the initial contracts between Union and its producers (some of which were wholly-owned affiliates) were fair and reasonable, the advantage thus created by their relatively low prices would belong in part at least to the customers of Union and thus to the customers of its affiliate, United; it could not be shunted by a mere intra-corporate entry into accounts available to stockholders only. A mere comparison of such prices with prevailing prices would not sufficiently justify the transactions.

The Commission's order in the case at bar was issued shortly before the opinion of this court in *City of Detroit, Michigan* v. *Federal Power Comm'n.*[4] There we reviewed an order which allowed a pipe-line company to evaluate gas produced in its own wells in terms of the "fair field" or "weighted average arm's-length" price which that gas would bring on the open market if sold by the pipe-line company in the producing area and to include the resulting amount in operating expenses to be recovered through the rates. We rejected this use of the field price, because the Commission record did not show that such an allowance was reasonably necessary to serve any stated ends of the Natural Gas Act. A 100 per cent affiliate stands in the same position as does the integrated producing "arm" of a pipe-line company. Therefore the Commission must on the record either relate the use of the weighted average arm's-length prices to legitimate ends of the Act or examine far enough to determine whether there is economic justification for the price increases paid by Union to affiliated producers.

We emphasize that we are dealing with a single corporate structure, which includes the parent, the two affiliated transmission subsidiaries (supplier and customer to each other),

[4] 97 U.S. App. D.C. 260, 230 F. 2d 810 (1955).

and the producers. We think the Commission must at least inquire into the reality of the price increases paid by Union to its wholly-owned and partly-owned affiliate producers, which increases were in part reflected in the United-Union prices. By this we mean that to include the increased prices in the costs of United the Commission must at least determine that the increases had sufficient factual economic justification; it must ascertain that they were not mere bookkeeping or intra-corporate-system adjustments. We must remand the case for that inquiry. We do not hold that a full-blown inquiry into the rates of Union is necessary. Subsequent developments in the proceeding may or may not indicate such a necessity.

II

Mississippi says its contracts with United require a separate determination of rates under each contract. It says that, until the Commission determines, upon a proper record, the public interest requires abrogation of the contracts, the separate contractual basis must be maintained. This result, it says, is required by the decisions in the *Mobile*[5] and *Sierra Pacific*[6] cases.

The so-called "old contract", the one of 1929, originally named the fields from which the purchased gas was to come. It named a price, later raised until it was a forty-five-cent demand charge and a five-cent commodity charge. Amendments to the contract in 1945 and 1949 did not repeat the field designation but merely specified that the gas be transported through a designated pipe line proposed to be constructed by United from the Carthage field in Texas to a

[5] *United Gas Co. v. Mobile Gas Corp.*, 350 U. S. 332, 100 L. Ed. 373, 76 S. Ct. 373 (1956).

[6] *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U. S. 348, 100 L. Ed. 388, 76 S. Ct. 368 (1956).

named point (Sterlington) in Louisiana. This amendment was intended by the parties, the examiner found, to assure systemwide availability of gas for Mississippi. The so-called "new contract" of 1951 did not specify the source fields of the gas to be purchased under it.

Evidence was presented to show, and the Commission found, that United's properties are integrated and interconnected and that the two lines from Sterlington to Perryville, the sole delivery point to Mississippi, were tied into all sources of supply running into the Monroe District. The Commission found that allocation to separate lines and sources of supply solely for Mississippi was not feasible, that the gas was commingled before delivery to Mississippi, and that continuance of two rates for the same service at the same point was not in the public interest and would result in unreasonable differences.

The Commission fixed a single rate of seventy-five-cent demand and ten-cent commodity charge for all sales to pipe-line companies in the Central Rate Zone served from United's transmission system. The rate under the "old" contract with Mississippi had been forty-five cents and five cents and under the "new" contract a dollar and thirty cents and twelve and a half cents. The net result of the single "rolled-in" rate is computed to be an increase in rates to be paid United by Mississippi of some $1,350,000 a year[7] over pre-investigation rates.

The Commission has power under Section 5(a) of the Natural Gas Act[8] to determine a just and reasonable rate or contract affecting rates whenever it finds that an existing

[7] The Commission makes reference in its brief to an annual reduction of nearly $1,000,000. But that was computed on the basis of an increase allowed to be put into effect by United, subject to refund, during the proceeding. That tentative increase became effective January 3, 1953. It is part of the total result here under dispute.

[8] 52 STAT. 823 (1938), 15 U. S. C. A. § 717d(a).

rate or contract affecting rates is unjust, unreasonable, unduly discriminatory, or preferential. In the case at bar the findings of the Commission were that the two rates on the separate contracts "are not in the public interest", that the continued existence of two rate schedules would constitute "maintenance of an unreasonable difference", and that compliance with Section 4 of the Act would be effected by a filing by United which would "eliminate unjust, unreasonable and unduly discriminatory rates to Mississippi" and would apply to Mississippi the same rates applicable to other customers. We think these findings adequately met the statutory prescription for underlying findings in Section 5(a).

We get the impression that Mississippi does not contest too strenuously the result of the Commission's order in dollars at this point but that the thrust of its argument is that it is entitled to the maintenance of its two contracts with separate rates rather than a single rate for all purchases. It does not specifically proclaim its disinterest in the dollar result, but it prepared and presented an exhibit which seemed to show that a seventy-five-cent demand and a nine-cent commodity charge under the "old" contract and a dollar-and-fifteen-cent and ten-cent charge under the "new" would yield the same amounts.

Mississippi makes two principal claims of damage to it. It claims that the single rate hurts it more than it hurts other purchasers from United since a larger proportion of its purchases were under the older, lower contract rates whereas the greater part of the others' purchases were under newer, higher contract rates. Again, the commodity price in the single rate is twice that in the old contract rate, and Mississippi claims that, because rates to interruptible industrial consumers are pegged largely on the commodity rate, the doubled rate is particularly injurious to that phase of Mississippi's operations. Sales direct to industry are not

regulated by the Commission, but it can influence these rates by its allocation of costs to industrial business as part of its determination of rates over which it has jurisdiction. A low commodity rate would enable Mississippi to meet competition from other fuels without jeopardizing its profits from its jurisdictional sales. These seem to be the principal reasons for Mississippi's opposition to the single rate. While they are potent from the standpoint of that company, they do not avail too much from the standpoint of general regulation and the public interest.

Mississippi argues that the Commission was required by the *Mobile* and *Sierra Pacific* cases, *supra*, to find specifically that the old contract rate of forty-five cents and five cents was itself unlawful before it could order it changed. Those cases each dealt with a single existing contract. The Court held that before the Commission could cause such a contract rate to be raised it must make the findings required by the statute. In the case at bar there are two existing contracts, one with a low rate and other with a high one. The Commission did not find specifically that the low rate was unreasonable, etc. It found that the two contracts, with two rates, were not in the public interest and would maintain an unreasonable difference. It seems to us that the action of the Commission was within the scope of the statute and within the doctrine of the *Mobile* and *Sierra Pacific* cases, even though not within the factual bases of those opinions. We think that in a situation involving two contracts, at different prices, for different portions of a single service, it is within the power of the Commission to combine the two contracts even though the combination results seemingly in a technical breach of the contractor's or the public's rights under the lower priced of the two contracts.

We think the record amply supports the Commission's conclusion that the two separate rates under the "old" and "new" contracts between United and Mississippi should give

way to the single rate applicable to all customers. We affirm its order on that point.

III

Mississippi says the Commission erred in omitting an "old" contract provision requiring United to supply it with additional quantities of gas. The amendment of 1945 to that contract provided that any time prior to May 1, 1961, Mississippi could call upon United for increased quantities of gas and thereafter United would furnish such increased amounts. In 1949 Mississippi requested United to supply 65 per cent of its requirements instead of the prior 40 per cent, and United complied. When United filed the tariff which became the basis for the Commission's present order, it omitted that clause of the contract, and the Commission approved the omission.

Mississippi says the omission is seriously prejudicial because United has always been the "backbone" of its source of supply and its right until 1961 to require United to supply its additional requirements is an integral part of its plans and a basis of reliance by its customers for an adequate supply. It says that under the Commission's regulations United could not unilaterally abrogate the clause in question.

The Commission says the clause accorded Mississippi a preferential right over all other customers of United and should therefore be eliminated. It says the omission was proper under the regulation.[9] It says that United could not possibly obligate itself to satisfy the full future requirements of Mississippi, let alone all of its customers.

The Commission further says the contract clause in question did not mean what Mississippi claims it meant but meant only that Mississippi could make one nomination of

[9] 18 C.F.R. § 154.85.

additional supply. It says this interpretation of the contract is demonstrated by Mississippi's own conduct: in 1950, when it needed more gas, it purchased from independent producers, and again in 1951, when it again needed more gas, it made a new contract with United instead of exercising the right it now says it had under the existing contract. This conduct, says the Commission, is inexplicable under Mississippi's present reading of the contract clause. Lastly, the Commission says if the clause meant what Mississippi claims it meant it would be within the plenary power of the Commission under Section 7(e) of the Act as amended.[10]

Without considering all the various contentions on the point, we think the clause in question, in the presence of dual contract rates, would create a discriminatory preference and therefore could properly be omitted from the approved tariff. Since we have approved the Commission's order eliminating the rate differential, the point loses much of its importance. We affirm the Commission's order on this point.

The Commission included in United's tariff a 72 per cent minimum take-or-pay clause. This would require Mississippi to pay a commodity charge measured by 72 per cent of the maximum daily quantity. The same requirement was imposed upon all of United's customers. Mississippi's objection is that this could have a very adverse effect, "if in a depressed business condition or a bad competitive position we were unable to sell as much gas as would be required to keep that old contract at 72 percent."

We think Mississippi's fears are not sufficient basis for a differentiation between it and all other customers. We accept at full value the Commission's assurance that "if, in the future, the provision should be considered by petitioner to be, in fact, onerous to it, the Act provides relief." Upon that basis we affirm the Commission on this point.

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[10] 56 Stat. 83 (1942), 15 U. S. C. A. § 717f(c).

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IV

As we have already pointed out, the rates under Mississippi's "old" contract, after the increase of January 3, 1953, were sixty-five cents demand and nine cents commodity. The over-all rate ordered by the Commission was seventy-five cents and ten cents. Mississippi says this was an increase in rates forbidden by Section 5(a) of the Act.[11] It says the Commission virtually, if not actually, ordered United to file the new schedule. Section 5(a) provides in pertinent part:

> "That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; * * *."

As we have seen, while the rates authorized by the Commission were higher than those in the "old" United-Mississippi contract, they were lower than those in the "new" contract. The whole action was to substitute a single rate for two separate rates found by the Commission to be unduly preferential. The Commission had a positive duty under the basic provisions of Section 5(a) to eliminate preferential discriminations. While the dollar amount of the charges authorized by the Commission was greater than the amount of the contract rates, it was less than the dollar amount shown by the conversion tariff filed by United and effective January 3, 1953. United's tariff would have increased the charges to Mississippi by some $2,400,000. The eventual increase under the Commission's order was, as we have noted, some $1,350,000.

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[11] *Supra* note 7.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,199—April Term, 1957.

MISSISSIPPI RIVER FUEL CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervenor.

On Petition for Review of Order of the Federal Power Commission.

Before: Prettyman, Bazelon and Burger, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Federal Power Commission on review in this case be, and it is hereby, vacated, and that this case be, and it is hereby, remanded to the said Federal Power Commission for further proceedings in conformity with the opinion of this Court.

Dated: July 8, 1957.

Per Circuit Judge Prettyman

Separate opinion by Circuit Judge Bazelon concurring in part and dissenting in part.

Original Opinion of United States Court of Appeals for District of Columbia Circuit, July 8 1957

We think the above-quoted proviso in Section 5(a) did not prohibit the Commission from eliminating the dual-rate structure of the two separate contracts when it found that system to be unduly preferential. Any over-all rate substitute would necessarily have to be higher than the very low rate of the "old" contract and higher even than that rate as adjusted in January, 1953. The increase in that rate was merely an essential part in the elimination of the dual-rate structure. We think it was authorized by Section 5(a) taken as a whole and as applied to the peculiar circumstances of this case. We agree with the Commission on this point.

Because of the necessity for further findings on Point I the Commission's order will be vacated and the case remanded for further proceedings.

BAZELON, *Circuit Judge*, concurring in part and dissenting in part: I agree that the order under review must be vacated for the reason stated in Part I of Judge Prettyman's opinion. But, from the balance of the opinion, holding the order otherwise proper, I am compelled to dissent.

The Commission's order, in effect, if not in terms, authorized United unilaterally to abrogate its two contracts with Mississippi, replacing them by new rates and conditions—or, at least, to reform the two contracts. My brethren conclude that the Commission had the power to do what it did under § 5(a) of the Natural Gas Act and that it made the findings required by that section to support its action. I agree that § 5(a) gives the Commission authority "to set aside or modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.'" *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 341 (1956). I do not agree, however, that the Commission made the findings necessary to support an exercise of § 5(a) power.

Original Opinion of United States Court of Appeals for District of Columbia Circuit, July 8 1957

The Supreme Court held in *Mobile, supra*, that a utility may not, by filing a new rate under § 4 of the Natural Gas Act, unilaterally change a rate to which it has bound itself by contract. The contract rate remains in force until the parties change it by agreement or until the Commission, after hearing under § 5(a), determines it to be unreasonable. A Commission determination that the unilaterally proposed new rate is a reasonable one does not amount to a determination that the old rate is unreasonable. *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U. S. 348, 354-55 (1956).[1] If the contract rate is to be determined to be legal, it must be upon a finding, supported by evidence, that the rate adversely affects the public interest—"as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.* at 355.

Here there are two contract rates. United's conversion tariff proposed a continuation of a two-rate schedule, but an increase of the rate specified in the earlier of the two contracts. The Commission rejected this proposal and ordered filing of a single rate, higher than the rate of the first contract and higher even than the rate to which United proposed to increase it,[2] but lower than the rate of the second contract.

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[1]Affirming our decision in *Sierra Pacific Power Co. v. Federal Power Comm'n*, 96 U. S. App. D. C. 140, 223 F. 2d 605 (1955). We there pointed out, citing *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951), that "[s]ince 'statutory reasonableness is an abstract quality represented by an area rather than a pinpoint,' the statutory purpose may be satisfied by more than one rate." 96 U. S. App. D. C. at 142, 223 F. 2d at 607.

[2]Mississippi argues that, since § 5(a) forbids the Commission to order a rate increase "unless such increase is in accordance with a new schedule filed by such natural gas company . . . ," the order is invalid with respect to the gas purchased under the first contract. But, as the Supreme Court said in *Mobile*, "if the Commission, after

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The Commission's order adopted the examiner's Initial Decision of July 18, 1955, with a modification to which I shall refer later. That decision, which occupies 111 pages in the joint appendix, culminates in 24 combined "Findings and Conclusions." In No. 2, the examiner declared that "United's rates, charges, classifications, and services . . . are subject to the jurisdiction of the Federal Power Commission *under the provisions of Section 4 of the Natural Gas Act.*"[3] In No. 17, he found the "just and reasonable" rates to be those earlier agreed upon in the settlement to which Mississippi was not a party, such dates being "the same as made to all other pipe-line customers served from United's transmission system in the Central Rate Zone." In No. 19, he said that to have two rates to Mississippi would "constitute the maintenance of an unreasonable difference in rates and charges for the same service at the same delivery point, contrary to the provisions of *Section 4(b) of the Natural Gas Act.*" Finally, in No. 20, he declared that "[c]ompliance with *Section 4 of the Natural Gas Act* will be effected by the making of a filing by United which will eliminate unjust, unreasonable and unduly discriminatory rates to Mississippi and which will apply to Mississippi the same rates which are now applicable to all its other pipe-line customers served from United's transmission system in the Central Rate Zone."

A fair reading of the Initial Decision supports the following observations:

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hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5(a) authorize the natural gas company to file a schedule increasing the rate." 350 U. S. at 345. The order here, instead of *authorizing* the filing of a new schedule, *orders* it. Since it is obvious that United wishes to file such a schedule, the use of "order" instead of "authorize" is in this case insignificant. Hence, if the Commission had made a § 5(a) determination to support its order, I would have no difficulty sustaining the order.

[3] Emphasis supplied throughout.

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Item 1—The examiner treated the proceeding before him as one under § 4 to determine the reasonableness of proposed new rates; not one under § 5(a) to determine the reasonableness of existing rates.

Item 2—He made no findings as to the reasonableness of the existing rates.

Item 3—He concluded that the proposed rates to Mississippi, to be reasonable, must not be different from the rates to United's other customers in the same rate zone.

Item 4—He concluded that maintenance of dual rates to a single customer for the same service at the same point is unreasonable *per se*.[5]

Items 1 and 2 above are, in my view, enought to call for reversal of the Order under the decisions in *Mobile* and *Sierra*, *supra*.[6] It is true that the Commission, in adopting the examiner's decision as its own, did seek to bring it within *Mobile* and *Sierra*[7] by amending Finding No. 2 to cite § 5 of the Natural Gas Act, as well as § 4. This afterthought cannot suffice, however, for the findings which would be necessary to support a § 5 determination are altogether lacking. See

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[5]The Commission also relies upon the examiner's Finding and Conclusion No. 13 that all gas delivered by United to Mississippi was commingled before delivery, so that a two-rate system was not feasible. To the extent that this is a finding, rather than a conclusion, it completely ignores the facts that (1) as of the date of the Commission's order United was in fact delivering gas to Mississippi on a two-rate schedule; and (2) United's proposal was for a continuation of a two-rate schedule. What metering system was employed by the parties to compute payments does not appear. That there was a system which they considered feasible seems clear.

[6]I would hold the Commission's order as ineffective to change the other terms of the contract, referred to in Part III of Judge Prettyman's opinion, as it is to change the rates.

[7]*Mobile* and *Sierra* had not yet been decided by the Supreme Court when the initial and final decisions in this case were issued. Both cases had, however, been decided by the respective circuit courts of appeals.

Sierra Pacific Power Co. v. Federal Communications Comm'n, 96 U. S. App. D. C. at 144, 223 F. 2d at 609.

Even if Items 1 and 2 were not enough to dispose of this case and we were required to address ourselves to the sufficiency of the determinations referred to in Items 3 and 4, I would hold that they do not support the order.

As to Item 3, I think the Supreme Court pointed out clearly enough in *Mobile* that mere difference in rates between customers is not unreasonable under the Natural Gas Act, as it is under the Interstate Commerce Act. "The Natural Gas Act . . . recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules." 350 U. S. at 345.

Similar considerations, I think, apply to Item 4. If the nature of the industry is such as to cause a gas buyer to make a long-term contract with a pipe-line for his requirements, it seems obvious that the buyer may revise his conception of his future requirements and seek to contract for additional gas and the seller, in those circumstances, may ask a higher price under the new contract. There is as little wrong with two contract rates to one customer as with different contract rates to different customers. Any of these rates may be stricken as unreasonable, if found so to be in a proceeding under § 5(a). But, in neither case are the rates unreasonable *per se*.

Supplemental Opinion of United States Court of Appeals for District of Columbia Circuit, September 19 1957

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,199 April Term, 1957

MISSISSIPPI RIVER FUEL CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervenor.

Before: Prettyman, Bazelon and Burger, Circuit Judges, in Chambers.

Upon consideration of petitioner's petition for rehearing and clarification of the opinion of this Court, of respondent's petition for rehearing and clarification of the opinion of this Court, and of intervenor's petition for rehearing, it is

ORDERED by the Court that the aforesaid petitions for rehearing be, and they are hereby, denied.

It is FURTHER ORDERED by the Court that insofar as petitioner petitions for clarification of the opinion of this Court and respondent petitions for clarification of the opinion of this Court, said petitions be, and they are hereby, granted and that that portion of the opinion promulgated July 8, 1957, beginning "In this situation there are several", near

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the bottom of page 4 of the slip print, and continuing to the end of part 1 of the opinion, is amended to read as follows:

> In this situation there are several important factors not ordinarily present. The United-Union prices were not arm's-length transactions. From time to time these prices between the two affiliates were increased. At least part of the increase authorized by the Commission in United's prices to Mississippi arose from these increases in United's payments to Union. If the United-Union increases were bona fide increases in costs incurred by Union in acquiring gas, that would be one thing; but, if they were merely a device for siphoning potential profits from one affiliate to another, for transferring amounts from an advantage to customers to an advantage for stockholders, that is another thing. If the initial contracts between Union and United were fair and reasonable, the advantage thus created by their relatively low prices would belong in part at least to the customers of United; it could not be shunted by a mere intra-corporate entry into accounts available to stockholders only. A mere comparison of such prices with prevailing prices would not sufficiently justify the transactions.
>
> The Commission's order in the case at bar was issued shortly before the opinion of this court in *City of Detroit, Michigan* v. *Federal Power Comm'n.*[4] There we reviewed an order which allowed a pipe-line company to evaluate gas produced in its own wells in terms of the "fair field" or "weighted average arm's-length" price which that gas would bring on the open market if sold by the pipe-line company in the producing area and to include the resulting amount in operating expenses to be recovered through the rates. We rejected this use of the field price, because the Commission record did not show that such an allowance was reasonably necessary to serve any stated ends of the Natural Gas Act. A 100 per cent affiliate stands in the same position as does the integrated producing "arm" of a pipe-line company. Under the doctrine of

[4] 97 U. S. App. D. C. 260, 230 F. 2d 810 (1955).

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the *City of Detroit* case United could not, on the record as it is now before us, use as costs the fair field price of gas produced by its affiliate, Union; a reconsideration by the Commission under the principles laid down in that case would be necessary.

But United did not seek to use fair field prices; it used contract prices fixed in contracts with its affiliate, and measured the reasonableness of those contract prices by the fair field prices. From time to time the affiliated contractors increased the prices applicable to sales between them. We think the Commission could no more test the reasonableness of interaffiliate prices by the use of fair field prices (without more) than it could allow as costs the fair field prices (without more). To be included in United's costs, increases in the interaffiliate prices must have some factual economic justification. By way of extreme example, if Union's production and delivery costs remained static *and it* increased its prices to United, that much of the corporate-system revenues would be shunted from United to Union. If, in this example, the full new prices were allowed as costs to United, one of two results would ensue. If United's prices to its customers had been yielding no more than a fair return, those prices would have to be increased to compensate for the increased costs. If United's prices had been yielding more than a fair return, so that a reduction in those prices was a possibility, that reduction would be forestalled by the increase in costs. Thus, by the allowance, in our example, of the increased Union-United prices as costs of United, the amount of the increase would be shunted from a potential benefit to the corporate-system customers (direct customers of United) to a benefit to the corporate-system stockholders. To a less extent any increase in the interaffiliate prices (Union-United) not reflecting increases in Union's costs or expenses would represent a shunting of benefit from customers to stockholders. We do not say that all benefits, in total amounts, due to initial advantageous arrangements at the wells or to astute original operational arrangement belong to the customers and none to the stockholders. But we

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do say that the whole of such benefits, as measured by increasing fair field prices, cannot be assigned to the stockholders by unexamined increases in interaffiliate prices accepted as costs of the affiliate-purchaser. The same course of reasoning which we followed in the *City of Detroit* case is applicable here. Therefore we think the Commission must at least inquire into the factual justification for the price increases paid by United to Union. By this we mean that to include the increased prices in the costs of United the Commission must at least determine that the increases were justified by reason of Union's costs or by reason of some other stated and of the Natural Gas Act; the Commission must ascertain that they were not mere bookkeeping or intra-corporate-system adjustments. We must remand the case for that inquiry. We do not hold that a full-blown inquiry into the rates of Union is necessary. Subsequent developments in the proceeding may or may not indicate such a necessity.

Per Curiam.

Dated:

Natural Gas Act of 1938, 52 Stat. 821

. . . .

[3] RATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days'

notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-

gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,*

That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

. . . .

REHEARING; COURT REVIEW OF ORDERS

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing

Natural Gas Act of 1938, 52 Stat. 821

in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * *

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[7766] Filed July 18, 1955

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Decision

Docket Nos. G-1142, G-2019, et al.

In the Matter of
UNITED GAS PIPE LINE COMPANY

UPON AN IVESTIGATION OF RATES AND CHARGES PURSUANT TO THE PROVISIONS OF SECTION 5(a) AND A FILING FOR AN INCREASE IN RATES PURSUANT TO THE PROVISIONS OF SECTION 4 OF THE NATURAL GAS ACT

. . . .

[7768] BINDER, Presiding Examiner: These proceedings involve the determination of just and reasonable rates and charges, within the meaning of the Natural Gas Act of 1938 (the Act) for the delivery and sale of natural gas for resale by United Gas Pipe Line Company (United) to Mississippi River Fuel Corporation (Mississippi)

. . . .

[7774] UNITED'S AFFILIATIONS, SIZE, GROWTH AND OPERATIONS

Clear understanding of what the issues are, how they arose, and how they should be resolved will be aided by a brief explanatory statement concerning United's system, including its affiliations, size, recent history, growth, and operations. The relative position of Mississippi in the picture

of United's rate structure, as a whole, may thus be seen in correct perspective.

United Gas Corporation (United Gas) has owned all the stock of United and of Union Producing Company (Union) since 1937. Union is a producing and exploration company. United is a pipe-line company, very largely engaged in transmission activities. United Gas, in addition to holding the securities of United and Union and other companies, is engaged in the local gas distribution business. The principal officers and directors of United Gas are the principal officers and directors of United and Union. United Gas is the parent of United and Union, and controls both companies.

United is one of the largest pipe-line companies in the world, serving large markets in Texas, Louisiana, Mississippi, Alabama, and Florida. It also supplies part of the requirements of transmission lines serving the Appalachian area, the Atlantic seaboard, and portions of the Mid-continent area. It owns and operates approximately 1,200 miles of field lines and approximately 8,000 miles of main Transmission lines. United purchases, transmits, and sells natural gas at city borders, to other pipe-line companies, to gas distributing utilities, to large industrial companies for their own consumption, and in

addition, has some plants for the separation of gasoline and liquid hydrocarbons from the gas in the line. United purchases natural gas from more than 200 gas fields and from hundreds of gas producers in Texas, Louisiana, and Mississippi who are unaffiliated with it. In addition, United purchases substantial quantities of natural gas from Union, an affiliate.[7] It contracts (both with unaffiliated producers

[7]See 10 FPC 35, referring to United Gas Corporation as the parent of United Gas Pipe Line Company, and Union Producing Company as an affiliate of United Gas Pipe Line Company.

and with Union) for gas purchases which cover various periods of time and various prices.

In recent years and particularly since the advent of long distance transmission pipe lines, competition in the purchase of gas has increased very substantially. During these years, United has experienced increasing competition in negotiating contracts for the purchase of gas from producers because of the increase in the number and size of new pipe-line companies which are also seeking to augment their supplies. In addition, the tremendous increase in the demand for natural gas has been a major factor in the increase in price. These and other factors have impelled United to pay higher prices to obtain new contracts than such company paid previously and also to pay higher prices in connection with the extension of old contracts. The result has been a continuing increase in the price of gas to United during the years this matter has been under consideration. The volume of United's gas purchases for the year 1952 as adjusted for known changes runs well over a trillion cubic feet.

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There is nothing to indicate any diminution in the demand for natural gas in the United States, nor is there any evidence in this record to indicate that gas prices will be lower in the immediate future. Because of the increasing demand for natural gas and despite the rise in the price of gas in recent years,[8] United has engaged and is continuing to engage in the expansion of its system, and in the pursuit of relationships with gas producers which it considered would assist it to maintain and improve the sources from which it could obtain its gas requirements.

A large expansion occurred following the grant of a certificate of public convenience and necessity to United in Docket No. G-1447.[9]

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[8]See Exh. 161.

[9]See United Gas Pipe Line Company, 10 FPC 35.

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Since the effects of the expansion of United's facilities authorized in Docket No. G-1447 are important to the rate-making problems dealt with herein, it appears advisable to make somewhat extended reference to the Commission's decision in that docket as it related to four matters: (1) What the expansion was, (2) the purposes for which the Commission authorized such expansion, (3) the rates made applicable to Mississippi in such decision, and (4) the dynamic character of United's history, growth operations and development of its gas reserves.

Specifically, the Commission described the proposal made by United in Docket No. G-1447 at page 37 of its opinion as follows:

"* * * the construction of approximately 1,005 miles of gas transmission pipe lines and appurtenant facilities consisting of two major pipe lines, one in the eastern and one in the western portion of its system. The west line would consist of approximately 540 miles of 30-inch, 26-inch, and 24-inch diameter pipe, extending from the Aqua Dulce Field in southern Texas northeasterly to the vicinity of Perryville, Louisiana. Compression facilities aggregating 42,200 horsepower are proposed to be installed on this line. The east line would consist of approximately 305 miles of 30-inch, 26-inch, 24-inch, and 20-inch diameter pipe, extending from Pure Oil Company's offshore acreage * * * in the Eugene Island area of the Gulf of Mexico, in a northeasterly direction to a point near Kosciusko, Mississippi, with 20,800 horsepower compression. Three supply and delivery lines, consisting of approximately 179 miles of various diameter pipe would extend from southern and southeastern Louisiana and Mississippi gas fields to various points of connection with the east line.

"The proposed construction is designed to increase United's system capacity by 920,000 Mcf per day, to an estimated total of 3,805,200 Mcf per day inclusive of gas transported for and exchanged with others * * *"

(2) Purpose of the Expansion:

In connection with the purposes for which the facilities described above were to be constructed, the Commission stated at page 41:

> "The facilities proposed in Docket No. G-1447 are intended to accomplish these general objectives: (1) Provide for a more balanced withdrawal and distribution of gas supply from presently-connected and from new gas fields; (2) increase the flexibility of the present system; and (3) enable United to meet the increased requirements of present customers and provide additional capacity required by the demands of new customers proposed to be served. It is estimated that with the proposed additional capacity, United would be able to provide for existing and future peak requirements in 1952-53, with the exception of the Wichita Falls District in which it is estimated that a deficiency of 27,400 Mcf will occur on the peak day in 1952-53. It is not now proposed that the Wichita Falls District will be connected with the rest of the system.[10]

> "In addition to accomplishing these general objectives, United proposes to make new sales of gas to Texas Eastern Transmission Corp. (Texas Eastern) and to Mississippi River Fuel Corp. (Mississippi River) * * *
>
> "United's proposed project is designed for a better balancing of gas supply in relation to the concentrated markets which United now serves and intends to serve. A relation of estimated requirements by districts and points of delivery in such districts to the location of United's various major sources of gas supply, indicates the need for additional facilities if the system is to be operated in the manner contemplated. The estimated peak-day requirements in volumes of gas, exclusive of gas transported for and exchanged with

[10]United has disposed of its Wichita Falls property since the issuance of the Commission's Opinion referred to above in Docket No. G-1447.

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others, which could be made available through existing and proposed facilities to meet such requirements, by districts, is shown to be as follows:"

(A table is then shown setting forth the requirements of all districts of United except Wichita Falls.)

The opinion continues:

"* * * We think that this concentration of major sources of gas supply in the southern portion of United's system requires the proposed transmission facilities in order to properly balance markets and supply in the existing system, and for the transportation of large volumes of gas from the southern part of the system to meet the requirements of customers now served and proposed to be served in the Monroe and Jackson districts.

"The system flexibility which United contends would result from construction of the proposed facilities relates to the ability to shift available supplies of gas over the system within limits. The overall operational flexibility which results from interconnections between existing and new facilities. United concedes that prudent engineering and operating practice would suggest the advisability of establishing interconnections in certain locations between the existing and proposed facilities, but it has not proposed to do so. We think that in order to assure more flexibility in operation and better service on the system, interconnections for emergency use should be made between existing and proposed new facilities * * *

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"We are of the opinion, and find, that the facilities proposed are reasonably adequate and necessary for the service proposed to be rendered thereby. * * *

"Mississippi River, whom United proposes to serve with additional volumes of gas through the proposed facilities, presented evidence tending to show that the annual requirements of that company as presented by United are slightly high. This evidence shows that

> although Mississippi River presented evidence in the hearings upon its application in Docket No. G-1281 to the effect that it would purchase approximately 150,000 Mcf per day from United on a 72% load factor, the requirements of its customer companies have increased at a greater rate than had been previously anticipated. However, the evidence in this record shows that Mississippi River doubts that its requirements will equal 150,000 Mcf per day on a 95% load factor, as shown by United, because it presently is investigating the possibilities of underground storage and of obtaining gas either from new sources or from renewal of other supply contracts.[11]

(3) The Rates Made Applicable to Mississippi:

The conclusion that the Commission in effect fixed the rates set in G-1447 at rates which were to be reconsidered upon the conclusion of the overall investigation of United's rates which was taking place in Docket G-1142 is made clear by the following language at page 45 of the Commission's opinion:

> "There is now pending at Docket No. G-1442 (sic) an investigation into the rates charged by United, and we therefore think it proper at this time to consider only the rates proposed to be charged for the new sales to Texas Eastern and Mississippi River. It is expected that the Commission's rate investigation will be concluded before the facilities herein authorized for the sale to Texas Eastern and Mississippi River are completed and that we will have considered on that record not only United's rates for existing sales but also the rates for the two new ones. * * *
>
> "It appears from the record that United assumed a systemwide rate of return of 6 per cent and then designed a rate for the deliveries to Texas Eastern and to Mississippi River which would result in the revenues required to reach the assumed over-all return

[11] Since the issuance of the Commission's decision in Docket No. G-1447, Mississippi has contracted for 150,000 Mcf per day.

United submitted a systemwide cost of service study including a 6 per cent rate of return which shows an average cost of 13.16 cents per Mcf on the

system. However, the record shows there is a wide disparity in rates on the system, both above and below the indicated present average cost of service; and in many instances United presently is making sales at a rate less than the average cost of purchased gas. *The conclusion of the pending investigation of United's rates should eliminate undue discrimination and may result in a revision of the company's rate structure.*" (Emphasis supplied)

These quotations from the Commission's Opinion make it very clear that the construction sought to be made by United and authorized in Docket No. G-1147 by the Commission was for general system purposes, and that the Commission intended to review the rates fixed in such docket for the sale of gas to Mississippi and other companies upon the conclusion of the Commission's investigation pending at Docket No. G-1142. (See 10 FPC at pages 45 and 46). Indeed, the language employed by the Commission gave direct notice that the rates which were being made applicable to Mississippi in Docket No. G-1147, i.e., the PL-2 rates, were rates to be reconsidered in the investigation in Docket No. G-1142, particularly in the light of United's rate structure as a whole, and that the conclusions reached as a result of such investigation might "result in a revision of the company's rate structure."

(4) The Dynamic Character of United's Growth and Operations:

The Commission referred to the dynamic character of United's history, growth, and operations, and discussed its gas reserves in its opinion in Docket No. G-1147 (p. 18) in the following language:

"The record shows the operating history of United for the past 20 years with respect to its gas purchase contracts with companies other than its affiliate, Union Producing Company. On January 1, 1930, United had 145 gas purchase contracts with non-affiliated producers, as compared with 402 such contracts as of November 1, 1950. On January 1, 1930, United was receiving gas from 27 fields under such contracts as compared with 207 fields on July 1, 1950, and

during the intervening period deliveries were commenced under 756 contracts and deliveries ceased under 456 contracts. Cessation of deliveries for most of the contracts terminated was a result of the depletion of the supply.

"During the period of 1945 through the first 10 months of 1950, in which there has been extensive growth in interstate gas transmission lines with a corresponding increase in competition for natural gas reserves, United entered into 343 new gas purchase contracts, which is almost three times as many contracts as were entered into during the six-year period of 1939 to 1944. In the period from 1945 to November 1, 1950, United extended the term of 178 of its gas purchase contracts as compared with 54 contracts which were extended during the 15 years prior to that time. The 178 extensions of contracts were for the most part for periods of 10 years. Between November 1 and December 31, 1950, United entered into eight new gas purchase contracts for substantial reserves, and extended the term of 15 gas purchase contracts.

"On the basis of the record, United has increased its recoverable reserves from an estimated total of 2.3 trillion cubic feet in 1930 to over 20 trillion cubic feet as estimated by Ralph E. Davis, or 16.1 trillion cubic feet as estimated by the Staff as of July 1, 1950, although the Company sold almost 6 trillion cubic feet of gas between 1930 and 1949

> "The record also shows that United has never had to cancel a sales contract because of inability to renew a gas purchase contract."

In connection with the dynamic character of United's growth, it may be observed that since the proceeding in Docket No. G-1447 was concluded the records of the Commission show that it has issued 19 certificate orders authorizing increases in United's facilities ranging from comparatively small amounts to over 5½ million dollars and totalling in excess of 18½ million dollars.[3]

* * * *

COST OF GAS PURCHASED

The Staff's brief, among other things, summarizes the method by which it arrived at its independent determination of United's purchased gas cost and it reads, in part, as follows:

> Starting with normalized sales volumes for the test period (T. 3457, Exh. 166), witness Stockwell normalized gas purchase requirements after verification of gas-supply data furnished by United (T. 3453-54). Checks of gas fields and a comparison of normalized requirements with actual 1953 data demonstrated the accuracy of the normalization (T. 3455, 3458, 3462, 3464, 3468). The gas requirements were normalized by fields, by districts, by areas, and further by purchases from non-affiliated producers (arm's length sales) and from Union (Exhs. 82-88). Where judgment as to the source of gas was vital, Stockwell relied on the experienced judgment of United's gas supply department personnel (T. 3741)."

As we have indicated heretofore, we have credited the testimony of staff witnesses relating to normalization of natural gas purchase requirements and sales volumes for the test period.

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[3] See Docket Nos. G-1465, G-1491, G-1571, G-1628, G-1820, G-1843, G-1879, G-1880, G-1904, G-1951, G-2064, G-2158, G-2258, G-2259, G-2416, G-2885, G-2889, G-4279, G-4885.

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The cost of purchased gas is extremely important in this case because in excess of $89,000,000 or over 60% of United's cost of service for the test period, represented the cost of natural gas purchased.

Union provided approximately 22% of United's natural-gas requirements for United's Monroe, Shreveport, Dallas, Houston and San Antonio operating districts for the test period.[5] Union is a wholly-owned affiliate of United Gas Corporation, as is United.

Prior to the Panhandle decision (Commission Opinion No. 269) the Commission determined the cost of natural gas where a natural-gas company itself, or an affiliated company was the producer, on the basis of actual operating expenses incurred in the production of the gas and allowed a return on the original cost of investment less accrued book depreciation. However, where a pipe-line company bought gas from an independent producer, the price paid to such independent producer was included as part of the pipeline's recoverable cost of service. Staff's presentation included cost of gas purchased from independent producers as of December 31, 1953 adjusted to calendar 1952, as part of United's cost of service.

During the course of this hearing, Mississippi's counsel stated that "We are not contesting the prices paid non-affiliated producers." Mississippi, however, in its brief objected to the inclusion in United's recoverable cost of service of sums paid by United to non-affiliated producers and to Union in the absence of affirmative proof that applications for certificates of public convenience and necessity and rate schedules had been filed pursuant

[5]While evidence was presented concerning the total amount of gas supplied to United, no evidence was presented concerning the percentage supplied to Union by the balance of the system for the test period.

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to Commission Order No. 174-A.

Mississippi's brief asserts (pp. 27, 28) that $17,000,000 out of the total of $89,218,255.00 represents cost of gas purchased by United from Union. A table at page 31 of Mississippi's brief shows that $10,340,348.00 represents cost of gas purchased from Union for the Monroe, Shreveport, Dallas, Houston, and San Antonio operating districts. The table shows cost of gas for other operating districts of United of $43,332,200.00, but contains no information concerning the percentage of gas supplied by Union. In referring to $17,000,000.00 as the cost of gas purchased by United from Union, Mississippi refers to page 3720 of the transcript. The transcript reference does not support Mississippi's statement as to the $17,000,000.00 amount and there is no evidence in the transcript as to the total specific amount of dollars paid to Union by United for the test period.

Although Mississippi apparently in one part of its brief included $17,000,000.00 as a sum which United was entitled to receive for gas purchased from Union, it objected in another part of its brief to the inclusion of cost of gas purchased from Union at any figure. In still another part of its brief, Mississippi shifted the emphasis of its objections from the prices paid non-affiliated producers for gas purchased to prices paid by United for gas purchased from Union. In this connection, Mississippi's argument may be summarized as follows:

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United executed numerous contracts with Union, many as far back as 1937. Between 1937 and June 7, 1954, numerous contracts and supplementary or amendatory contracts were entered into by these companies. Such supplementary

contracts, among other things, increased the price of gas per Mcf payable by United to Union. Mississippi claimed that United was limited in the amount which it is entitled to recover for cost of gas purchased from Union to the amount per Mcf set forth in initial contracts between United and Union, and was not entitled to include in its cost of service natural gas as priced and paid for by United in the supplementary or amended contracts. Mississippi points out that if its theory of gas pricing for United were applied here, the cost of service figures might be so reduced that they would preclude any rise in the level of United's rates.[26] Mississippi contends further that, on the basis of its analysis of the contracts between United and Union in the period between 1937 and 1953, covering gas from the Monroe, Shreveport, Dallas, Houston and San Antonio districts alone, United's cost-of-gas-purchased account has been inflated by over 4¾ million dollars, of which Mississippi is being asked to pay over $900,000.

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To support its contentions, Mississippi has cited a line of cases[27] which hold in substance that where affiliated companies enter into contracts and there is "an absence of arm's length bargaining between two corporate entities involved, and of all the elements which ordinarily go to

[26]Mississippi's brief, page 38.

[27]*Western Distributing Company* v. *Public Service Commission of Kansas, et al.*, 285 U. S. 119 (1932); *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 152-153 (1930); *Cities Service Gas Company* v. *Federal Power Commission*, 155 Fed. (2) 694 (8th Cir. 1946), cert. denied, 329 U. S. 773 (1946); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d. 943, 957 (10th Cir. 1944), cert. denied, 324 U. S. 629 (1946); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 307 (1937); *Dayton Power & Light Co.* v. *Public Utilities Commission (Ohio)*, 292 U. S. 290, 308 (1934); *United Fuel Gas Co.* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 320 (1929).

fix market value" and where an increase of rates is sought, a regulatory agency or a court is justified in ignoring such contracts and should look to other factors to determine just and reasonable costs.

Mississippi has established that from 1937 to the present time United Gas Corporation has owned all the stock of both United and Union and that the power of United Gas Corporation to exercise its control over such companies has manifested itself through the election of interlocking directorates and the selection of joint officers.

If there has been an absence of arm's length bargaining in the making of the contracts between United and Union as there appears to have been, such absence is characteristic of both the

initial and the amendatory contracts. Accordingly, the cases relied upon by Mississippi do not support the conclusion that only the initial contracts, but not the amendatory contracts, should be considered valid. They establish that both initial and amendatory contracts should be ignored unless they are supported by objective criteria.

If the prices in contracts between Union and United are to be ignored, we must then look to other factors to determine what is fair, just and reasonable for United to obtain for natural gas acquired from Union. However, before embarking upon such determination, it appears advisable to consider at this time Mississippi's other contentions relating to cost of gas purchased.

Certain of Mississippi's contentions are made on an alternative basis. These contentions are to the effect that all of United's "gas purchases must be made pursuant to contracts legally filed and accepted by the Commission as rate schedules" or that "all of United's gas purchase costs are subject to investigation, cross examination as to the justifica

tion for the precise volumes and prices used and to possible whole or partial disallowance."

The inconsistency of the alternative contentions made by Mississippi is apparent when it is realized that the first alternative referred to above, if accepted, would require a conclusion that, absent filing pursuant to Commission Order 174-A, there could under the law be no recovery for payments made for purchased gas, at least for test period purposes, whereas under the second alternative mentioned,

there can be such recovery even though no filing whatever were made under Commission Order 174-A or any other filing rule or regulation of the Commission.

To support its contention that cost of gas purchased from non-filing producers cannot be included in United's recoverable cost of service for the test period, Mississippi cites as precedent *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951).

The Montana-Dakota case is wholly inapplicable to the instant situation. The issue involved in such case was whether an action would lie to recover losses alleged to have been sustained by petitioner in paying for service at filed rates when it and the respondent had an interlocking directorate and were under common control. The principle which was involved was that, where a rate is filed, accepted, or approved by the Commission, a customer company cannot be made to pay a different rate than the filed rate, nor, on the other hand, can it recover payments made under the filed rates (which allegedly were inflated) because acceptance of such filed rates was brought about by reason of petitioner's dominance by the common management of petitioner and respondent, and petitioner's consequent lack of independence and ability to protest. It was in this context that the cost in Montana-Dakota, said "It [peti-

tioner] can claim no rate as a legal rate that is other than the filed rate * * *."

This language was quoted by Mississippi in its brief, but a quotation relating to the inability of a litigant to recover alleged overcharges in filed rates which it accepted and paid is not applicable to the instant situation, where the value of the gas obtained has been established in these proceedings by objective standards. The facts involved in the Montana-Dakota are entirely different from the facts in the present case. Moreover, the principles of law involved and the language quoted from the Montana-Dakota case have no application here. It may also be pointed out that the Commission's rules relating to filing were not drafted to cover cases such as United's purchases from Union during the test period.

Certain other cases cited by Mississippi on this point in its brief are equally impertinent.[28] In general, it may be said that such cases stand for the proposition that when rate schedules are filed and accepted, then they are paramount to rights established by earlier franchises or contracts entered into between customers and the filing company, and also for the proposition that when a rate schedule is filed and accepted, no different rate may be charged.

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[28] *North Hempstead* v. *Public Service Corp.*, 231 N. Y. 442, 132 N.E. 144 (1921); *Public Service Commission* v. *Pavilion Natural Gas Company*, 232 N. Y. 143, 133 N. E. 427 (1921); *Kansas City Power & Light Co.* v. *Midland Realty Co.*, 338 Mo. 1141, 93 SW 2d 954 (1936) affd; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U.S. 109 (1937); *Suburban Water Co.* v. *Borough of Oakmont* 268 Pa. 243, 110 A 778 (1920); *Duquesne Light Company* v. *Public Service Comission* 273 Pa. 287, 117 A 63 (1922); *Leiper* v. *Baltimore & P. R. Co.*, 262 Pa. 328, 105 A 551 (1918); *V & S Bottle Co* v. *Mountain Gas Co.*, 261 Pa. 523, 104 A 667 (1918), app. dis. 251 U.S. 544 (1919); *Harrison Electric Co.* v. *Citizens Ice and Storage Co.*, 149 Ark. 502, 232 S. W. 932 (1921); *Cotton* v. *Commonwealth Edison Co.*, 349 Ill. app. 400, Ill. N. E. 2d 363, 366 (1953).

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Neither the Mobile Gas Service case nor the Tyler gas case[29] is of assistance at this point in the proceeding because the basic issue is such cases related to the requirement of payment at increased rates subsequent to filing and before a hearing was had concerning the lawfulness of the increased rates which were sought.

Here, a determination is being made after a hearing on the merits. The plaintiffs in both Mobile and Tyler recognized, as did both courts of appeal, that the Commission after a hearing on the merits could fix the rates at a level which it determined to be just and reasonable, and which might be at variance with and in complete disregard of the contract rates. Here we are engaged in determining just and reasonable rates after a full and complete hearing.

The legal effect upon rate making in this case by reason of a failure to file either rate schedules or certificates of public convenience and necessity pursuant to Commission Order No. 174-A, as modified by any supplier of gas to United,[30] must be considered in the following context:

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Prior to the Phillips decision,[31] the Commission had exercised its jurisdiction under the Act principally to regulate companies primarily engaged in pipe-line operations and activities incidental thereto. In such cases where the pipe line was affiliated with a gas producer through common

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[29] *United Gas Pipe Line Co. v. Mobile Gas Service Corp. and Federal Power Commission*, 215 F. 2d. 883 (3rd Cir., Sept. 7, 1954), certiorari granted February 28, 1955; *Tyler Gas Service Co., et al. v. United Gas Pipe Line Co.*, 217 F. 2d. 73 (5th Cir., Nov. 24, 1954).

[30] No proof was adduced concerning filings by United's suppliers under Order 174-A.

[31] *Phillips Petroleum Company v. State of Wisconsin, et al.*, 347 U. S. 672.

control, or where a pipe line controlled a gas producer, only the pipe line filed applications for certificates of public convenience and necessity under Section 7 of the Act and rate schedules pursuant to Section 4 of the Act. Although the Commission exercised its rate-making powers with regard to determining how much an affiliated producer could get from the pipe line for gas which it produced and sold to such pipe line, the Commission did not require a separate filing by the producing affiliate under either Section 4 or 7 of the Act.

The Supreme Court, in Phillips, held that the authority vested in the Commission by the Act was broader than the Commission had theretofore exercised. The Court held, in substance, that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, and that the exclusionary provisions of Section 1 (b) of the Act relating to "the production and gathering of natural gas" did not encompass an exemption from the provisions of the Act for sales of natural gas for resale made in interstate commerce.

Prior to the Phillips decision, the Commission had adopted certain rules and regulations under the Natural Gas Act governing the

filing of rate schedules and certificates of public convenience and necessity by natural gas companies, viz., Part 154 —Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code Federal Regulations. In general, it appeared that these regulations had been promulgated upon an assumption that the ambit of the Commission's jurisdiction was not as large or embracive as that which the Supreme Court in Phillips had found to exist. These regulations, which had been adopted long before June 7, 1954, when Phillips was decided, were principally designed for filings

by pipe-line companies. Moreover, a reading of the provisions of these regulations indicates that they were drafted primarily for application to companies which were much larger than many of those held by Phillips to be subject to Commission jurisdiction.

In an effort to provide as workable and simple a set of regulations as was reasonably possible for the several thousand persons engaged in the production and gathering of natural gas, who transported or sold such gas in interstate commerce and were held by Phillips to be subject to Commission jurisdiction, but who were not primarily engaged in the operation of an interstate pipe line, the Commission, on July 16, 1954 issued its Order No. 174 prescribing rules and regulations governing the filing of rate schedules and certificates of public convenience by persons subject to the Act under the Supreme Court's holding. On August 16, 1954, the Commission by the issuance

of its Order No. 174-A rescinded and superseded Order No. 174. Order No. 174-A was subsequently amended by Order No. 174-B issued by the Commission on December 17, 1954.

These new rules and regulations are limited by their terms to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court's decision in Phillips. These rules and regulations treat the rates of "independent producers" subject thereto which were in effect prior to June 7, 1954 as "initial" rates, and such rates are not subject to suspension except where increases above prices in effect prior to June 7, 1954 are involved. Moreover, the Commission's accounting requirements are not made applicable to filings thereunder.* The rules do not require

*The Commission's Uniform System of Accounts for Natural Gas Companies, among other things, requires all cost expense and revenue data submitted in support of filings be segregated and classified. The absence of accounting requirements suggests that the Commission's Uniform System of Accounts in its present form is not

persons subject thereto to justify the rates in effect prior to June 7, 1954 and filed thereunder, and there is no provision for a "roll-back" of rates charged by persons who filed pursuant to Orders Nos. 174-A and 174-B.

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It may also be observed that, while the Commission has authority to investigate rates subject to its jurisdiction under Section 5(a) of the Act, the determination of the reasonableness of prior unfiled rates and past increases in contract prices, for the purposes of recovery of sums of money for natural gas paid thereunder, is not a matter over which the Commission under the Natural Gas Act has any authority.

The Commission in its El Paso opinion[33] referred to its unwillingness to permit its opinion in Panhandle (Opinion 269) to exclude, in the future, consideration of other methods of valuing gas and then stated that "We are, however, presently of the view that such method as may be adopted in the future should be employed for both the independent producer and the pipe-line company."

The Commission is, of course, faced with many complex matters resulting from the Supreme Court's decision in Phillips particularly with regard to establishing principles applicable to fair and lawful determination of rates for producers who had believed that they were exempt from Commission jurisdiction under the exclusionary provisions of Section 1(b) of the Act. In connection with these problems, the Commission pointed out that "To facilitate the reaching of an informed opinion on this question, the Commission has issued a notice of proposed

readily applicable for use by an "independent producer" or by combination oil and gas producers and consequently could not be applied without revisions to companies subject to Order No. 174-A.

[33] *In the Matter of El Paso Natural Gas Company*, Opinion No. 278 (Mimeo ed. p 6, et seq.)

rule making inviting all interested parties including producers, gatherers, transmission companies, distributors, state commissions, municipalities, and representatives of consumer interests to submit their views to the Commission concerning principles and methods to be applied by it which could be used in regulating the price of natural gas sold by producers in interstate commerce for resale. Presumably such principles and methods could also be applied to gas produced by transmission companies."

It is in this context that Mississippi seeks, in effect, to impose a sanction upon United by excluding from its recoverable cost of service for the test period amounts paid by United to Union and to non-affiliated producers, by reason of United's failure to put in evidence showing that Union and other producers have made filings pursuant to Commission Order 174-A, as amended. Mississippi asks that the Presiding Examiner take official notice of Union's action against the Commission in the United States District Court for the District of Columbia[34] and asserts that Union, and possibly other producers have failed to file a rate schedule pursuant to Commission Order No. 174-A, as amended.

It may be that Union or other United suppliers may have become subject to the fines and penalties provisions of the Act by reason of their failures to file rate schedules under 174-A.[35] However, whether

such penalty provisions are or are not applicable to such producers, it does not follow therefrom that Mississippi or any other customer is entitled to have excluded from Uni-

[34] The Presiding Examiner takes official notice of *Union Producing Co. v. Federal Power Commission*, 127 F. Supp. 88 (D. C.).

[35] It should be made clear that the Presiding Examiner is not attempting to express any opinion that such provisions are or are not applicable to Union or any other producer.

ted's cost of gas purchased for the test period purchased from a producer who has decided to litigate the question of the validity of the Commission's order before complying therewith. Specifically it does not follow that if Union is unsuccessful at the end of the litigation it will not comply with the determination made by the courts. The imposition of a sanction such as the exclusion from United's recoverable cost of gas obtained from Union during the test period because of Union's failure to file or because some other producer may have failed to file rate schedules for gas which it supplied to United finds no warrant in the law. In this connection, it may be pointed out that even in the absence of any filing under Order No. 174-A, as amended, producers subject thereto may not under Section 7(b) of the Act abandon service to United without an order of the Commission. On the other hand, United cannot obtain natural gas without paying for it.

There was no good ground for granting Mississippi's application for a subpoena duces tecum addressed to a member of the Staff requiring him to compile a list of all United's producers who had filed under Order No. 174-A. The denial of such request did not, as Mississippi contends, deprive it of due process.

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As we have noted, one of Mississippi's alternative approaches to price determination was stated as follows: "*all* of United's gas purchase costs are subject to investigation, cross examination as to the justification for the precise volumes and prices used and to possible whole or partial disallowance." (Italics supplied.)[36]

This approach, if adopted, would result in the institution of hundreds of rate cases which could not even be presented for a considerable period of time because the investigation, which would have to be conducted by the Commission's

[36]Mississippi Brief, P. 6.

staff before institution of proceedings would necessarily be time consuming and, of course, statutory notice to producers before instituting hearings would be imperative. If this course were followed, these proceedings would be prolonged for several additional years. By the time it was determined which of United's suppliers were subject to the Commission's jurisdiction and what the rates of such suppliers should be, the rates charged by such suppliers in 1952 or 1953 would be of academic rather than functional value for purposes of rate determination.

As United's counsel stated in regard to this matter during the course of these hearings:

> "I am not in disagreement with what Mr. McAllister said. I am not in disagreement with what the Examiner said, nor what Mr. Fletcher said about getting into 600 rate cases. We are not asking for that. We do not intend to do it, and I think it would be a foolish thing and I think it is an illegal thing."

Following this "concession" by Mississippi's counsel Mississippi shifted the brunt of its attack from gas prices paid non-affiliated producers to prices paid Union. This matter was gone into at great length during the course of the hearings.

The approach of counsel to the Commission to establishing the figure of $89,218,255 for cost of gas purchased may be summarized as follows:

A properly qualified Staff Witness examined all contracts entered into between United and Union, and between United and other producers and found out what prices United was paying for natural gas under such contracts as of December 31, 1953. The witness applied such prices to normalized gas requirements for the test period and determined in his capacity as an accountant that United's cost of gas pur-

chased was $89,218,255.00. This figure of course included gas supplied to United by Union.

The inclusion in cost of gas purchased of amounts of gas from Union at the price per Mfc paid by United is challenged by Mississippi as unjust, unreasonable and unlawful, in part, for reasons already discussed. Mississippi also complained that while the Staff witness examined the contracts in question, he made no statement that he "consid-

ered such contract costs to be proper, fair, and reasonable." The Staff claimed that the contracts and prices contained therein were examined critically and were not considered perfunctorily or mechanically, as Mississippi claimed that they were.

It may be pointed out that determination of whether the prices contained in United's contracts with Union were "proper, fair and reasonable" is a matter for the Presiding Examiner or the Commission to decide on the basis of the evidence presented, and not a matter for the witness to determine. This is not to say that contentions made by the parties, including the staff, with regard to evidence or the law, are not entitled to consideration. They are, and they have been considered.

The Staff claimed that the prices determined upon for gas purchased from Union which went into United's cost of gas were founded upon substantial evidence. The evidence and legal considerations which the Staff considered applicable to prices of gas obtained from Union rested upon the relationship of such prices to prices paid to non-affiliated producers by United in the same districts.

It will be noted that the Staff witness who testified with regard to this matter prepared certain exhibits (82-88 inclusive) which were received in evidence. Examination of the exhibits shows that on a

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comparative basis United's gas purchase costs, insofar as gas obtained from Union is concerned, were not in excess of the prices paid in the same districts to non-affiliated producers, and on an overall basis were less than those paid by United to non-affiliated producers. In fact, the exhibits prepared by the Staff and introduced in evidence show that the weighted average price paid by United to its non-affiliated producers is substantially more than the average weighted price paid by United to Union, and this fact was not contradicted by any other evidence in the record.

Evidence introduced by United[7] shows that the average weighted prices paid by United to Union between 1948 and 1953 were lower than the average prices paid to non-affiliated producers, i.e., producers whose prices Mississippi does not challenge as being unfair, unjust or unreasonable.

While it is true that United's contracts with Union were not reached as a result of arm's length bargaining, the evidence presented shows that the prices contained in such contracts, when based upon objective standards unrelated to the relationship between United and Union, were not above a level which Mississippi has conceded to be fair, just, and reasonable for others, i.e., prices paid by United to Union were not above prices reached between United and non-affiliated producers as a result of arm's length bargaining.

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In its petition for rehearing filed November 23, 1954, following the issuance of Commission Opinion No. 277, Mississippi asserted that "The Commission erred in the use of the prices charged by Union Producing Company, an affiliate of United, for gas purchased from said affiliate, whereas the Commission should have determined the price that should

[7] See Exh. 161

be allowed in accordance with the principles established in the Panhandle decision (Opinion No. 269), and in refusing to determine the reasonableness of the prices paid by United to said affiliate and other producers."

There is no basis for concluding that if the Panhandle approach to price determination were applied here instead of the one that was adopted that there would be any reduction in the amount arrived at for gas obtained from Union.

Despite Mississippi's claim in its petition that the Panhandle approach to price determination should have been applied here, during the course of the hearing accorded the parties, one of Mississippi's Counsel appeared to shift its position on this point, taking the view that while Panhandle exemplified a justifiable legal theory of pricing for a company which produced its own gas, it was not applicable in this case because two different companies were involved, i.e., United and Union, and "When you have contract relationships those contract relationships control." Accordingly, it appeared that at the very same time Mississippi was arguing that "contract relationships control" it contended that they did not control because of the affiliations of the contracting parties.

7826

In the Panhandle case (Opinion No. 269) the Commission held that "ultimate public interest will be better served by permitting the pipeline company to receive for the gas which it produces a price reflecting the weighted average arm's length payments for natural gas in the fields (and sometimes from the same wells) where it is produced than through the application of the 'rate base' method to this commodity."

Although price determination as effected in Panhandle was somewhat different than the approach to price determination made by the Staff here, reference is made to Pan-

handle in this decision among other reasons because of Mississippi's reliance upon the principles of that case and, to point out, in addition, that Mississippi does not contend that the "rate base" approach to Union's production should be applied here. Reference is also made to the Panhandle case because Mississippi's statements in reference thereto demonstrate that it has accepted the basic principle of Panhandle, namely, that gas produced by a natural gas company had the same value as a commodity at the well-head as gas purchased by an independent producer, and that such value should be attributed to it in determining the rate to which the natural gas company was entitled for sales at distant point."" This principle which Mississippi has urged as being correct and which should be accepted here

is applicable not only to pipe line companies which produce their own gas, but to pipe line companies which obtain gas from an affiliate with which it is under common control.

It appears that both Mississippi and the Staff accept the proposition that gas produced by a pipe line company should be valued in analogous circumstances at the same price as gas obtained at competitive levels from independent producers. Moreover it appears despite protestations to the contrary that when Mississippi's contention are subjected to analysis, its basic complaint is not that the principles of Panhandle should not be applied here but that the manner in which those principles were applied in these proceedings was improper, i.e., only the specific approach made in Panhandle (Opinion No. 269) may be used. The method of valuing gas employed in Panhandle if applied here would not serve to reduce cost of gas purchased and thus to reduce rates to Mississippi and consequently its objections on this score as to cost of gas purchased are without merit.

Presiding Examiner's Opinion Filed July 18 1955

The Presiding Examiner finds that cost of gas for the test period was $89,218,255.00.

. . . .

[7881] FINDINGS AND CONCLUSIONS

Upon consideration of the entire record made in this proceeding, the evidence adduced, the briefs filed, and the matters relevant to a decision herein upon which the parties and participants have reached agreement, the Presiding Examiner *finds and concludes*, in addition to the findings and conclusions hereinbefore stated, that:

(1) United Gas Pipe Line Company is a person engaged in the transportation of natural gas in interstate commerce, and the sale in interstate commerce of such gas for resale, and is a natural gas company within the meaning of the Natural Gas Act.

[7883] (8) $113,628,905 is a just and reasonable amount for the total cost of service for United's entire system, including taxes and reasonable return for calendar year 1952, as adjusted.

. . . .

[7883] (9) $89,218,255 is a just and reasonable amount for cost of natural gas purchased by United for calendar year 1952, as adjusted.

. . . .

[7898] SAMUEL BINDER
Presiding Examiner

Filed: July 18, 1955
Issued: July 21 1955

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Order Modifying Decision of Presiding Examiner and Affirming Decision As So Modified

8001

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck and William R. Connole
190-2 Formal-Duplicate

In the Matters of

United Gas Pipe Line Company

Docket Nos. G-1142, 2019, *et al.* G-1508, G-2074, G-2210, G-2220, G-2378

On July 18, 1955, the Presiding Examiner certified and filed with the Secretary of the Commission the record herein, including his Initial Decision which was served upon all parties to these proceedings.

Subject to review by the Commission, the Examiner required that United Gas Pipe Line Company (United), within 20 days from the issuance of the Decision, make an appropriate filing with the Commission which would eliminate Rate Schedule PL-2 and Rate Schedule PL-3 of its FPC Gas Tariff, Original Volume No. 1, applicable to the delivery and sale of natural gas in interstate commerce by United to Mississippi River Fuel Corporation (Mississippi) for resale, and which would apply to Mississippi a single rate schedule which would be just, reasonable, not unduly discriminatory or preferential. By order issued August 4, 1955, herein, the Commission, among other things, extended the time within which United was required to make the appropriate filing to a date to be fixed by further order of the Commission.

Order Modifying Decision of Presiding Examiner and Affirming Decision As So Modified

Exceptions to the Decision were filed by Mississippi, Tyler Gas Service Company and City of Tyler, Texas (jointly), and counsel for the Staff of the Commission. Oral argument upon the exceptions was had before the Commission on September 29, 1955.

Upon consideration of all the evidence of record, the briefs filed, the Initial Decision of the Presiding Examiner, the exceptions thereto, the oral argument had, and the entire record, the Commission finds that the aforesaid Decision should be modified as hereinafter ordered, and that as so modified the Decision should be affirmed.

8002

The Commission *orders*:

(A) The second sentence in the first full paragraph on page 52 of the Decision (mimeo. ed.) and reading as follows:

"These rules and regulations treat the rates of 'independent producers' subject thereto which were in effect prior to June 7, 1954, as 'initial' rates, and such rates are not subject to suspension except where the increases above prices in effect prior to June 7, 1954 are involved."

erroneously suggests that rates in effect on June 7, 1954 and prior thereto when filed pursuant to the Commission's 174 series of orders are "initial rates" in all cases, and such sentence be and it is hereby eliminated from the Decision.

(B) Finding No. (2) appearing at page 117 of the Decision (mimeo. ed.) be and it is hereby modified to include reference to Section 5 of the Natural Gas Act under which the proceeding in Docket No. G-1142 was initiated, and so as to read as follows:

Order Modifying Decision of Presiding Examiner and Affirming Decision As So Modified

"The provisions governing United's rates, charges, classifications, and services appearing in United's FPC Gas Tariffs, Original and First Revised Volume No. 1, are subject to the jurisdiction of the Federal Power Commission under the provisions of Section 4 and Section 5 of the Natural Gas Act."

(C) United Gas Pipe Line Company shall, within twenty (20) days of the issuance of this order, make an appropriate filing consonant with the provisions of the order accompanying the Decision of the Presiding Examiner and appearing at page 120 thereof (mimeo. ed.).

(D) The Decision of the Presiding Examiner filed herein on July 18, 1955, and issued on July 21, 1955, as modified by this order, be and the same is hereby affirmed; and said Decision as so modified shall become effective as the decision of the Commission as of the date of issuance of this order.

8003

(E) To the extent that the exceptions filed by Mississippi River Fuel Corporation and by Tyler Gas Service Company and City of Tyler, Texas (jointly) are inconsistent with the order of the Commission herein, such exceptions be and the same are hereby denied.

By the Commission.

J. H. Gutride,
J. H. Gutride,
Acting Secretary.

Adopted: November 2, 1955
Issued: November 8, 1955

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